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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRAULIO CORTEZ SANDOVAL,

Defendant and Appellant.

H041939

(Santa Clara County

Super. Ct. No. C1481874)

Defendant Braulio Cortez Sandoval was placed on probation after he pleaded no contest to active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)),¹ receiving a stolen vehicle (§ 496d), and two counts of driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) and admitted two gang enhancement allegations (§ 186.22, subd. (b)). On appeal, he challenges five of the standard “GANG” probation conditions imposed by the trial court. First, he claims that the electronics search and passwords conditions are unreasonable and unconstitutionally overbroad. Second, he contends that the gang clothing and gang area conditions are unconstitutionally vague and overbroad. Finally, he claims that the court proceedings condition is unreasonable and violates his First Amendment rights. We reject his challenges and affirm the probation order.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

I. Background

Defendant and two of his fellow VST gang members were arrested when they were found inside a vehicle that had been stolen from near defendant's home less than a day earlier.² This stolen vehicle was accompanied by another vehicle containing more fellow VST gang members. That vehicle too had been stolen less than a day earlier. The two stolen vehicles had been "tagged" with VST gang insignia. Defendant identified himself to the police as "an 'Intruders' Sureno street gang member," and he was wearing blue clothing and had multiple gang tattoos. "Intruders" is a subset of the VST criminal street gang.

Defendant was charged with two counts of active participation in a criminal street gang, two counts of receiving a stolen vehicle, and two counts of driving or taking a vehicle with gang enhancement allegations as to the receiving and driving or taking counts and an on-bail enhancement (§ 12022.1) allegation. He entered into a plea agreement under which he agreed to plead no contest to one of the gang counts, one of the receiving counts, and both driving or taking counts, and to admit two of the gang allegations. In exchange for his pleas and admissions, the remaining counts and allegations would be dismissed, and he would be placed on probation conditioned on a year in jail. Defendant entered his pleas and admissions. The court suspended imposition of sentence, placed defendant on probation for three years with numerous conditions, and dismissed the remaining counts and allegations.

The probation conditions included a standard search condition and a group of 10 standard "GANG" conditions.³ The search condition provided: "[Y]ou shall submit your

² The facts of the offenses come from the police reports, which the parties stipulated formed the factual basis for the pleas and admissions.

³ The standard gang conditions were on a preprinted form listing 16 gang conditions with a checkbox next to each one. Ten of the boxes were checked.

person, your place of residence, your vehicle and any property under your control to search at any time by any peace officer without a warrant without reasonable suspicion.” The gang conditions required that defendant “not knowingly” (1) “possess, wear or display” any gang clothing or insignia, (2) “associate with” gang members, (3) “visit or remain in any specific location which you know to be or which the probation officer informs you is an area of criminal-street-gang-related activity,” or (4) “be present at any court proceedings where you know or that [sic] the probation officer informs you that a member of a criminal street gang is present or that the proceeding concerns a member of a criminal street gang unless you are a party, a defendant in a criminal action, subpoenaed as a witness or a member of your immediate family is a victim of the activity charged in the case unless a parties’ [sic] attorney has asked you to testify or speak in court or unless you have the prior permission of the probation officer.”

The standard gang conditions also included the following two conditions, which we will refer to as the electronics search and passwords conditions. “You shall provide all passwords to any electronic devices including but not limited to cellular telephones, computers or notepads within your custody or control and you shall submit said devices to search at anytime without a warrant by any peace officer.” “You shall provide all passwords to any social media sites, including but not limited to Facebook, Instagram and Mocospace, and you shall submit these sites to search at any time by a peace officer without a warrant without reasonable suspicion.”⁴ Defendant timely filed a notice of appeal.

⁴ Defendant’s trial counsel objected to the gang conditions “based on the freedom of speech [and] association protect[ion] . . . [and] the right to privacy” and on the ground that they were “unreasonable under *People V. Lent* . . . [and] vague and overbroad” He asserted that “the area of criminal-street-gang activity has been defined within the County of Santa Clara by the law-enforcement community [so as to] encompass[] most of San Jose, including most of South San Jose where [defendant’s] mother lives” thereby making it overbroad. He asked the court to narrow that condition to encompass only “an

II. Discussion

Defendant challenges five of the gang probation conditions on reasonableness, vagueness, and overbreadth grounds.

“Trial courts have broad discretion to impose such reasonable probation conditions ‘as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer’” (*People v. Chardon* (1999) 77 Cal.App.4th 205, 217; § 1203.1, subd. (j).) “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality’ [Citation.]” (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*).)

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions.’” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that ‘abstract legal commands must be applied in a specific context,’ and that, although not admitting of ‘mathematical certainty,’ the language used must have ‘“reasonable specificity.”’” (*Ibid.*) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court

area in which the probation officer has in fact specifically told him that’s an area of gang activity.” Defendant’s trial counsel asserted the electronics search and passwords conditions abridged defendant’s “right to privacy.” The trial court overruled these objections. Only facial constitutional challenges may be raised on appeal without an objection below. (*In re Sheena K.* (2007) 40 Cal.4th 875, 881-882, 886-887 (*Sheena K.*)). Since defendant’s trial counsel challenged all of the gang conditions on reasonableness, privacy, First Amendment, vagueness, and overbreadth grounds, all of the contentions that defendant raises on appeal were preserved.

to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness. [Citation.]” (*Ibid.*)

The overbreadth doctrine focuses on other, though related, concerns. “[A]dult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights” (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) “A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K., supra*, 40 Cal.4th at p. 890.) Under this doctrine, ““a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”’ [Citations.]” (*In re Englebrecht* (1998) 67 Cal.App.4th 486, 497.) “‘A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.’ [Citation.]” (*Ibid.*)

“[T]he right to privacy is not absolute, but may yield in the furtherance of compelling state interests.” (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) Even where there is “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct constituting a serious invasion of the privacy interest,” the constitutional right to privacy is not violated if “the invasion of the privacy interest is justified because it substantially furthers one or more legitimate competing or countervailing privacy or non-privacy interests.” (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 695, disapproved on a different point in *People v. Gonzales* (2013) 56 Cal.4th 353, 373.)

A. Electronics Search and Passwords Conditions

Defendant challenges these two conditions as unreasonable under *Lent* and as unconstitutionally overbroad.

He first claims that these conditions are unreasonable because they are not related to his crimes or his future criminality. This court rejected that contention in *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*). In *Ebertowski*, the defendant, a criminal street gang member, pleaded no contest to two counts and admitted a gang enhancement allegation. There was evidence that the defendant had used social media to promote his gang, but his offenses did not involve electronic devices or social media. The trial court granted probation and imposed the same electronics search and passwords conditions that defendant challenges in this case. On appeal, the defendant challenged those conditions on reasonableness and overbreadth grounds. This court held that the conditions were reasonable under *Lent*. Since these conditions “were designed to allow the probation officer to monitor defendant’s gang associations and activities,” they were related to his gang crimes. And because the defendant’s “association with his gang” was likely to lead him to commit more crimes, these conditions were also related to his future criminality. (*Ebertowski*, at pp. 1176-1177.)

Defendant tries to distinguish *Ebertowski* and instead relies on two decisions by the First District Court of Appeal. In *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*), the minor had been found to have committed misdemeanor possession of Ecstasy. (*Erica R.*, at p. 912.) There was no indication that she was involved in gangs or sales of drugs or that she had ever used an electronic device. The First District distinguished *Ebertowski* and held that the electronics search and passwords conditions were unreasonable as applied to the minor because they were unrelated to her offense or her future criminality. (*Erica R.*, at pp. 913-915.) In *In re J.B.* (2015) 242 Cal.App.4th 749 (*J.B.*), the minor was found to have committed petty theft. (*J.B.*, at p. 752.) There was no evidence that the minor was involved in gangs or drug sales. Distinguishing

Ebertowski and relying on *Erica R.*, the First District held that the electronics search and passwords conditions were unreasonable because they had no relationship to the minor's offense or his future criminality.⁵ (*J.B.*, at pp. 754-755.)

We continue to adhere to our holding in *Ebertowski*. Unlike the minors in *Erica R.* and *J.B.*, defendant in this case, like the defendant in *Ebertowski*, is a gang member convicted of gang crimes. When a probationer is a gang member who has committed gang crimes, his or her future criminality is necessarily linked to his or her ability to shed those gang ties. As a result, the probation officer must have the ability to closely monitor the probationer's communications to ensure that those gang ties are not being reanimated. Without access to the probationer's electronic devices and social media accounts, the probation officer would not be able to ensure that the probationer was not associating with gang members or promoting the gang and thereby posing a danger to the community while on probation. We reject defendant's *Lent* challenge to the electronics search and passwords conditions.

Defendant also challenges these conditions as unconstitutionally overbroad because they infringe upon his Fourth Amendment and privacy rights. In *Ebertowski*, this court upheld these conditions against such a challenge because the conditions were justified by the need to minimize the risk that the defendant posed to the community.⁶

"The evident purpose of the [electronics search and] password[s] conditions was to

⁵ The California Supreme Court recently granted review of a First District case addressing this issue. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.)

⁶ In *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), a different panel of this court distinguished *Ebertowski* and found unconstitutionally overbroad a condition requiring the defendant's devices to be "'subject to forensic analysis search'" (*Appleton*, at p. 721.) That panel held that "the state's interest here . . . could be served through narrower means. For example, the trial court could impose the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring." (*Appleton*, at p. 727.)

permit the probation officer to implement the search, association, and gang insignia conditions that were designed to monitor and suppress defendant's gang activity. Without passwords for defendant's devices and social media accounts, the probation officer would not be able to search them under the unchallenged search condition in order to assess defendant's compliance with the unchallenged association and gang insignia conditions. . . . Access to all of defendant's devices and social media accounts is the only way to see if defendant is ridding himself of his gang associations and activities, as required by the terms of his probation, or is continuing those associations and activities, in violation of his probation." (*Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175.) The defendant's "constitutional privacy rights are not improperly abridged by the [electronics search and] password[s] conditions any more than they are by the search condition. . . . The minimal invasion of his privacy that is involved in the probation officer monitoring defendant's use of his devices and his social media accounts while defendant is on probation is outweighed by the state's interest in protecting the public from a dangerous criminal who has been granted the privilege of probation." (*Ebertowski*, at p. 1176.)

Defendant again seeks to distinguish *Ebertowski* and rely on a First District case. In *In re Malik J.* (2015) 240 Cal.App.4th 896 (*Malik J.*), the minor had violated his probation by committing three robberies and possessing eight baggies of marijuana. (*Malik J.*, at pp. 899-900.) The juvenile court continued him on probation but added electronics search and passwords conditions. (*Malik J.*, at p. 900.) The First District found these conditions to be unconstitutionally overbroad and narrowed them to exclude passwords for social media and to restrict the searches to exclude remote storage and forensic searches. (*Malik J.*, at p. 906.)

We find *Malik J.* distinguishable. Unlike in *Ebertowski* and here, there was no indication that the minor in *Malik J.* was involved in gangs. As this court pointed out in *Ebertowski*, the need to closely monitor gang members who are placed on probation provides a strong justification for imposing these conditions and outweighs the intrusion

on those probationers' constitutional rights. These conditions were not unconstitutionally overbroad.

B. Gang Clothing and Gang Area Conditions

Defendant challenges as unconstitutionally vague and overbroad the conditions requiring that he “not knowingly” (1) “possess, wear or display any clothing or insignia . . . that you know or the probation officer informs you is evidence of, affiliation with, or membership in a criminal street gang” or (2) “visit or remain in any specific location which you know to be or which the probation officer informs you is an area of criminal-street-gang-related activity.”

Defendant claims that the gang area condition is unconstitutionally vague “[b]ecause of the large spectrum and constant shifting of . . . gang territory.” He asserts that the gang area condition is unconstitutionally overbroad because “an overwhelmingly large portion of the country could be defined as ‘gang area.’” The gang area condition applies only where defendant actually knows or has been informed by the probation officer that the “specific location” is prohibited. This court upheld this gang area condition against a vagueness and overbreadth challenge in *People v. Barajas* (2011) 198 Cal.App.4th 748 (*Barajas*). (*Barajas*, at pp. 754-760.) In *Barajas*, this court relied in part on *In re Michael D.* (1989) 214 Cal.App.3d 1610 (*Michael D.*). In *Michael D.*, the Fourth District Court of Appeal rejected a minor’s claim that a gang area condition was unconstitutionally overbroad as to him because “he lives in the Middleside gang area.” (*Id.* at p. 1617.) Defendant does not mention *Barajas* or *Michael D.* As we agree with their reasoning for rejecting vagueness and overbreadth challenges to a gang area condition, we reject defendant’s challenge to the gang area condition.

Defendant claims that the gang clothing condition is unconstitutionally vague and overbroad because “virtually any color or any symbol” may be associated with a gang, and “‘gang clothes’” is a “constantly changing and shifting” category. Like the gang area

condition, the gang clothing condition applies only when defendant actually knows or has been informed by the probation officer that the clothing is prohibited. Hence, the condition is not vague. Defendant premises his challenge to this condition on cases that did not involve probation conditions. (See *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744 [challenge to a county's enforcement of a dress code at the county fair]; *Vasquez v. Rackauckas* (9th Cir. 2013) 734 F.3d 1025 [challenge to a civil injunction].) We decline to infer that the probation officer will inform defendant that all colors of clothing and all symbols of any kind are associated with gangs. The condition's limitation to clothing defendant is aware is associated with gangs suffices to limit its breadth. We reject defendant's challenges to this condition.

C. Court Proceedings Condition

Defendant claims that the court proceedings condition is unreasonable because it is not related to his offense or his future criminality. "Schools and courthouses are 'known gang gathering areas[,]'" and the restriction on court attendance is aimed at preventing the gathering of gang members to intimidate witnesses at court proceedings." (*People v. Martinez* (2014) 226 Cal.App.4th 759, 766.) Although defendant's offenses did not involve court proceedings, he is a gang member. Gang members are known to gather at court proceedings for the purpose of intimidating witnesses. By prohibiting defendant from doing so, the court proceedings condition enhances his ability to refrain from engaging in witness intimidation, which is plainly related to his future criminality. The condition satisfies *Lent*.

Defendant also asserts that the court proceedings condition violates his First Amendment right to attend court proceedings. In *People v. Leon* (2010) 181 Cal.App.4th 943 (*Leon*), this court modified a broader court proceedings condition to narrow its scope in order to address First Amendment concerns. (*Leon*, at p. 954.) The condition imposed on defendant is similar to the modified condition approved of by this court in *Leon*.

Defendant contends that *Leon* is not on point because this court was not addressing in *Leon* one aspect of his contention. This aspect is defendant's contention that the court proceedings condition permits another gang member, by attending a court proceeding, to "take away" defendant's First Amendment right to attend that court proceeding. A probation condition may permissibly infringe on a probationer's constitutional right so long as it is narrowly tailored. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The court proceedings condition is narrowly tailored in this respect. The state has a compelling interest in preventing witnesses from being intimidated at court proceedings. The condition permits defendant to be present at proceedings in which he or a family member is involved. He may also obtain the probation officer's permission to attend court proceedings from which he would otherwise be barred. We are satisfied that the condition is as narrowly drawn as it could be to accomplish its purpose.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

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